

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

MONTGOMERY TOWNSHIP POLICE OFFICERS :  
 :  
 v. : Case No. PF-C-06-1-E  
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 MONTGOMERY TOWNSHIP :

**FINAL ORDER**

The Montgomery Township Police Officers (Union) filed exceptions with the Pennsylvania Labor Relations Board (Board) on July 31, 2006, to a Proposed Decision and Order (PDO) of July 12, 2006, in which a Board Hearing Examiner concluded that Montgomery Township (Township) did not violate Act 111 or Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) when it increased employe contributions into the police pension fund for 2006. The Township filed a brief in response to the exceptions on August 23, 2006.

The uncontested Findings of Fact are set forth at length in the PDO, and for purposes of these exceptions are briefly summarized as follows. The Township has had in place a pension plan for its police officers which required each participating police officer to contribute five percent of the employe's salary to the fund. The plan document also provided that if an actuarial study shows that employe contributions are not necessary, the Township may, annually by an ordinance, reduce or eliminate the employe contributions. (Finding of Fact 2). In 1999 and 2000, the Township did not reduce employe contributions, and the police officers each contributed five percent of their pay. (Finding of Fact 4). For the years 2001 through 2005, the Township enacted ordinances eliminating the employe contributions as permitted by the pension plan document. (Finding of Fact 5). The Township and Union entered into a collective bargaining agreement effective December 24, 2004 through December 20, 2007. The collective bargaining agreement did not address employe contributions to the pension fund, but provided that all matters previously in force and not changed by the contract shall remain in effect. (Findings of Fact 6, 7). While that agreement was in effect, the Township did not enact an ordinance to eliminate employe contributions to the pension fund for 2006. The Township advised the Union that for 2006 the employes would be required to contribute five percent of their monthly salary in accordance with the pension plan document. (Findings of Fact 8-10).

Upon review of the testimony and documentary evidence the Hearing Examiner determined that the Township had a sound arguable basis under the collective bargaining agreement for believing that the pension plan documents continued to govern employe contributions. Therefore, because the Township did not enact an ordinance eliminating employe contributions for 2006 the police officers were required to contribute five percent of their salary under the pension plan documents, as was consistent with previous years. Finding no change to either the agreed upon terms in the contract, or to the parties' past practice of making employe contributions to the fund in accordance with the pension plan document, the Examiner concluded that the Township had not committed an unfair labor practice, and dismissed the Union's charge.

The Union argues on exceptions that Act 30, amending Act 600,<sup>1</sup> requires renegotiation of the police pension plan. In this regard, the Union asserts that in 2002, the General Assembly amended Act 600 to eliminate the requirement of employe contributions to a police pension fund, and vitiate any plan documents or practices in effect before Act 30 was enacted. However, the Union points to nothing in Act 30 that renders inoperative the parties' prior understandings and agreements with regard to employe pension contributions. See Wilkes-Barre Township Police Benevolent Association v. Wilkes-Barre Township, 35 PPER 137 (Final Order, 2004), *affirmed*, Wilkes-Barre Township

<sup>1</sup> Act of May 29, 1956 P.L. (1955) 1804, No. 205, as amended, Act of April 17, 2002, P.L. 239, No. 30, 53 P.S. §§ 761-778.

v. PLRB, 878 A.2d 977 (Pa. Cmwlth. 2005) (employer could not unilaterally alter pension provisions after Act 30).

The Union argues that the Examiner erred in finding that the Township had a sound arguable basis under the collective bargaining agreement for its actions. The case law is well settled that a public employer may not unilaterally alter terms agreed to in a contract. Wilkes-Barre Township, supra. However, a public employer may effectively defend against an alleged bargaining violation for unilaterally altering a mandatory subject of bargaining, by pointing to agreed upon contract language that arguably supports its actions evidencing that the employer's conduct was not unilateral. Where such language in the contract exists, the employer is said to have a "sound arguable basis" in the agreement, or a "contractual privilege," and thus did not commit an unfair labor practice under Act 111 or the PLRA. Pennsylvania State Troopers Association v. PLRB, 804 A.2d 1291 (Pa. Cmwlth. 2002).

As found by the Examiner, Article 27 of the parties 2005 - 2007 collective bargaining agreement continued in effect "all other matters previously in force and not changed by the terms of this contract." (Finding of Fact 7). There are no provisions in the collective bargaining agreement governing employe contributions to the pension fund. Instead, the employe pension contributions are outlined in the pension plan documents that were in effect prior to the 2005 collective bargaining agreement. On these facts, it was reasonable for the Examiner to conclude that the Township had a sound arguable basis in Article 27 of the collective bargaining agreement for believing that police officers' contributions to the pension fund continued to be governed by the pension plan documents.<sup>2</sup>

Further, the Union claims the Examiner erred in concluding that there was no change in the *status quo* relative to the police officers' pension contributions. In this regard the Union asserts that the *status quo* had been the period since 2001 requiring no employe contribution to the fund. To rise to the level of a binding past practice, the subject matter at hand must be a mandatory subject of bargaining and the parties' actions taken with regard to that subject "must be accepted in the sense of being regarded by the men involved as the normal and proper response to the underlying circumstances presented." County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 34 n.12, 381 A.2d 849, 852 n.12 (1978). The *sine quo non* of a bargaining violation mid-term of a collective bargaining agreement is change. Thus, in order for there to be an unfair practice relative to a past practice it must be found that there was a unilateral change to the practice. Pennsylvania State Troopers Association v. Pennsylvania State Police, 36 PPER 101 (Final order, 2005), *affirmed sub nom unreported*, Pennsylvania State Troopers Association v. PLRB, No. 1661 C.D. 2005 (Pa. Cmwlth. July 3, 2006).

The essence of the Union's exceptions is that merely because circumstances have been that police officers have not contributed to the pension fund since 2001, the officers may not be required to pay into the fund for 2006. The Union's argument misses the mark in regard to the practice involved in this case. The practice at issue is not a zero contribution as alleged by the Union, but it is how the employe contribution rate is set from year to year. The Township pension plan document expresses that the Township, on review of an actuarial study, will decide annually whether to reduce or eliminate employe contributions to the pension fund for that year. Simply because for five years the Township had come to the conclusion that no employe contribution was needed for those years, does not establish a practice of no future contribution, but instead evidences furtherance of the practice of deciding whether to eliminate contributions on review of an actuarial study, a practice followed since 1999, and for 2006.

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<sup>2</sup> The Union asserts that the Examiner erred in rejecting Exhibit U-7, an actuarial study which the Union claims evidences that the Township's current shortfall in the pension fund was of its own making, and therefore should not support an increase in employe contributions. We agree with the Examiner that this evidence is irrelevant to the Charge of Unfair Labor Practices. As discussed, the "sound arguable basis" defense presumes the need for an interpretation of contract language, which is within the purview of the grievance / arbitration process where U-7 may, or may not, have relevance.

Indeed, the stipulation of fact that there had been a five percent employee contribution in 1999 and 2000, defeats the Union's claim that the binding past practice was zero percent contributions. The Township's manager testified that pursuant to the pension plan documents no ordinances were passed in 1999 and 2000 reducing the police officers' contributions to the pension fund, and therefore the officers contributed five percent of their monthly salary for those years. From 2001 through 2005, there are ordinances in the Township's records, similar to Exhibit T-2, which eliminate employee contributions in accordance with the pension plan document. The Township Manager testified that for the year 2006, the Township again acted under the pension plan document and resolved to enact no ordinance reducing or eliminating employee contributions to the pension fund as required under the pension plan documents. To the extent the Union may be claiming that the past practice is that the Township only implemented employee contributions where it was actuarially necessary, and here it was not, it is undisputed that the Township relied on an actuarial study in deciding not to reduce employee contributions for 2006.

As found by the Examiner, the record shows that, if a past practice existed, the conduct accepted by both parties was that police officers' contributions to the pension fund were governed by the pension plan documents. As the evidence reflects, the Township, since 1999, as it had done for 2006, acted pursuant to the pension plan document in deciding whether to enact an ordinance to reduce or eliminate the five percent employee contribution required by the pension plan document. Accordingly, the Examiner did not err in finding that the Township had not unilaterally altered a binding past practice in violation of Act 111 and the PLRA.

After a thorough review of the exceptions and all matters of record, the Township did not commit an unfair labor practice by failing to enact an ordinance for 2006 eliminating police officers' contributions to the pension plan, resulting in a five percent employee contribution under the Township's police pension plan document. Accordingly, the Examiner's dismissal of the Charge of Unfair Labor Practices was not in error.

ORDER

In view of the foregoing and in order to effectuate the policies of Act 111 and the Pennsylvania Labor Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that exceptions filed by the Montgomery Township Police Officers are hereby dismissed, and the July 12, 2006 Proposed Decision and Order, be and hereby is made absolute and final.

SIGNED, SEALED, DATED and MAILED this seventeenth of October, 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

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L. DENNIS MARTIRE, CHAIRMAN

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ANNE E. COVEY, MEMBER

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JAMES M. DARBY, MEMBER